Azmi bin Osman v Public Prosecutor and another appeal

A

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NOS J-09–27–01 OF 2014 AND J-09–28–01 OF 2014
BALIA YUSOF, ROHANA YUSUF AND ABANG ISKANDAR JJCA
29 SEPTEMBER 2015

B

Criminal Law — Anti-Money Laundering and Anti-Terrorism Financing Act 2001 — Offence of knowingly engaging in proceeds of unlawful activity — Monies in large amounts credited into account of accused — Whether accused took steps to ascertain whether monies were proceeds of unlawful activity — Whether accused ought to have reason to believe that monies were illegal proceeds — Whether third party notice determined with finality fate of property seized — Whether appeal premature — Whether open for judge to delve into doubt by offering alternative views Anti-Money Laundering and Anti-Terrorism Financing Act 2001 ss 3, 4(1)(a), 55 & 61

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The accused was suspended from his duty as a Police Superintendent in Secret Societies, Gambling and Vice Division of Polis Diraja Malaysia, pursuant to an investigation against him, initially under the Prevention of Corruption Act 1997, but in the course of investigation, was suspected to have committed offences under s 4 of the Anti-Money Laundering and Anti-Terrorism Financing Act 2001 ('AMLATFA'). The accused had an unknown source of income of about RM9,481,414.18 and was subsequently charged at the sessions court on four charges of money laundering but was acquitted by the sessions court judge ('SCJ') without calling for his defence. The High Court judge ('the first HCJ') allowed the appeal and ordered the accused to answer to all the four charges before the sessions court. The same SCJ convicted and sentenced the accused on all the four charges. The SCJ further ordered that a third party notice under s 61 of the AMLATFA be issued against the accused in respect of the forfeiture of the seized property. The accused appealed to the High Court and the High Court judge ('the second HCJ') held that the accused ought not to have been called to enter his defence to all the four charges because the prosecution evidence did not establish a prima facie case. The accused was acquitted and discharged on all four charges. The second HCJ further affirmed the issuance of a notice under s 61 of the AMLATFA by the SCJ. Hence, the present appeals.

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Held, allowing the appeal by the prosecution; dismissing the appeal by accused:

I

(1) When the first HCJ made the decision for defence to be called, the latter was carrying out his appellate jurisdiction. The jurisdiction to correct the

purported error by the first HCJ, lies with the Court of Appeal, should there be an appeal against the decision of the second HCJ. The second HCJ had erred when he disturbed the findings of the earlier the first HCJ who had ordered the accused to enter on his defence to all the four charges, on appeal. His role was limited to determining whether the defence had raised a reasonable doubt at the end of the defence case (see paras 28–29).

(2) The accused had been proven to have accepted bribes from persons who were involved in illegal gambling. He had been receiving proceeds from illegal gambling activity in exchange for him giving protection for them, from enforcement action against them by the police. There existed grounds for the accused to reasonably believe that the monies he received and banked into his Maybank accounts were proceeds from unlawful activity. At the same time, the monies were also corrupt monies, being bribes given to him by the gambling operators. The evidence led by the prosecution had established beyond reasonable doubt that the impugned conduct of the accused in relation to the monies that he had received in his Maybank accounts fitted into the profile of a money launderer as defined under s 3 of the AMLATFA (see paras 40 & 57).

(3) The convictions entered against the accused on all the four charges were safe to be affirmed. Hence, the order of acquittal and discharge of the accused on all the four charges by the the second HCJ at the end of the prosecution case was set aside and the conviction entered against the accused by the SCJ was reinstated. The act of issuing the notice under s 61 of the AMLATFA is only a procedural step in ensuring that no genuine third parties' rights are improperly denied. The third party notice, in itself, does not determine with finality the fate of the property that was seized in connection with the commission of the offence (see paras 55, 58 & 63).

(4) There was no forfeiture order that had been made by the SCJ and there was basis for her to issue the statutory notice in order to facilitate the process pertaining to the eventual forfeiture of the seized properties which were the subject matter of the offence. As such, the appeal of the accused in respect of the issuance of the notice under s 61 of the AMLATFA was premature and the appeal by the accused against the order on s 61 notice was, therefore, dismissed (see para 63).

(5) The SCJ erred in applying the 'same transaction' principle in passing sentence for the four charges. The facts relating to the four charges clearly did not justify such invocation of the principle. The essential element of proximity of time was clearly absent. The four offences were committed during a period covering 2002 to 2005. Although the interest of the accused person must be taken into account when passing sentence, the

interest of the public is paramount, especially bearing in mind the fact that the accused was occupying a position of trust when he committed the offences (see paras 67–68).

[Bahasa Malaysia summary

Tertuduh telah digantung daripada jawatannya sebagai Superintenden Polis di Kongsi Gelap, Judi dan Naib Bahagian Polis Diraja Malaysia, berikutan siasatan terhadapnya, pada awalnya Akta Pencegahan Rasuah 1997, tetapi sepanjang waktu siasatan, telah disyaki melakukan kesalahan di bawah s 4 Akta Pencegahan Pengubahan Wang Haram dan Pencegahan Pembiayaan Keganasan 2001 ('AMLATFA'). Tertuduh menerima pendapatan sebanyak RM9,481,414.18 daripada sumber yang tidak diketahui dan seterusnya dipertuduh di mahkamah sesyen atas empat pertuduhan penggelapan wang tetapi telah dibebaskan oleh hakim mahkamah sesyen ('HMS') tanpa memanggil pembelaannya. Hakim Mahkamah Tinggi ('HMT pertama') membenarkan rayuan dan memerintahkan tertuduh menjawab kesemua pertuduhan di hadapan mahkamah sesyen. HMS yang sama menyabitkan dan menghukum tertuduh atas keempat-empat pertuduhan. HMS selanjutnya memerintahkan notis pihak ketiga di bawah AMLATFA diisukan terhadap tertuduh berkaitan dengan pelucuthakan harta yang disita. Tertuduh merayu ke Mahkamah Tinggi dan hakim Mahkamah Tinggi ('HMT kedua') memutuskan bahawa tertuduh sepatutnya tidak untuk memasukkan pembelaannya atas keempat-empat pertuduhan kerana keterangan pendakwaan tidak membuktikan kes prima facie. Tertuduh dibebaskan dan dilepaskan atas keempat-empat pertuduhan. HMT kedua seterusnya mengesahkan pengeluaran notis di bawah s 61 AMLATFA oleh HMS. Maka, rayuan ini.

Diputuskan, membenarkan rayuan oleh pendakwaan; menolak rayuan oleh tertuduh:

(1) Apabila HMT pertama membuat keputusannya untuk pembelaan dipanggil, yang kedua sedang menjalankan bidang kuasa rayuannya. Bidang kuasa untuk membetulkan kekhilafan dikatakan oleh HMT pertama, terletak dengan Mahkamah Rayuan, sekiranya ada rayuan terhadap keputusan HMT kedua. HMT kedua telah terkhilaf apabila dia mengusik dapatan awal HMT pertama yang telah memerintahkan tertuduh untuk memasukkan pembelaannya terhadap keempat-empat pertuduhan, atas rayuan. Peranannya terhad untuk menentukan sama ada pembelaan telah menimbulkan keraguan munasabah di akhir kes pembelaan (lihat perenggan 28–29).

(2) Tertuduh telah dibuktikan telah menerima suapan daripada orang yang terlibat dalam perjudian haram. Dia telah menerima hasil daripada aktiviti perjudian haram dalam pertukaran untuk dia memberi perlindungan untuk mereka, daripada tindakan penguatkuasaan

terhadap mereka oleh pihak polis. Terdapat alasan untuk tertuduh semunasabahnya percaya bahawa wang yang diterimanya dan dibankkan ke dalam akaun Maybank beliau adalah hasil daripada aktiviti haram. Pada masa yang sama, wang itu juga adalah wang rasuah, yang merupakan suapan yang diberikan kepadanya oleh operator perjudian. Keterangan yang dibawa oleh pihak pendakwaan berjaya membuktikan di luar keraguan munasabah bahawa kelakuan tertuduh yang menjadi persoalan berhubung dengan wang yang telah diterima di akaun Maybanknya sepadan dengan profil tukang penatu wang sebagaimana yang ditakrifkan di bawah s 3 Akta AMLATFA (lihat perenggan 40 & 57).

(3) Sabitan yang dimasukkan terhadap tertuduh atas keempat-empat pertuduhan adalah selamat untuk disahkan. Maka, perintah pembebasan dan pelepasan tertuduh terhadap keempat-empat pertuduhan oleh HMT kedua pada akhir kes pendakwaan diketepikan dan sabitan dimasukkan terhadap tertuduh oleh HMS dikenakan semula. Tindakan pengeluaran notis di bawah s 61 AMLATFA hanyalah langkah prosedural dalam menentukan bahawa tiada hak pihak ketiga yang tulen wajar dinafikan. Notis pihak ketiga, secara sendirinya, tidak menentukan dengan muktamad nasib harta yang disita berkaitan dengan kesalahan itu (lihat perenggan 55, 58 & 63).

(4) Tiada perintah pelucuthakan yang telah dibuat oleh HMS dan terdapat dasar untuknya untuk mengeluarkan notis statutori untuk memudahkan pelucuthakan akhir harta-harta yang disita yang mana merupakan hal perkara kesalahan itu. Oleh itu, rayuan tertuduh berkaitan dengan pengeluaran notis di bawah s AMLATFA adalah tidak matang dan rayuan oleh tertuduh terhadap perintah notis s 61, oleh itu, ditolak (lihat perenggan 63).

(5) HMS terkhilaf dalam mengguna pakai prinsip 'same transaction' dalam membuat hukuman untuk empat pertuduhan itu. Fakta yang berkaitan dengan empat pertuduhan secara jelas tidak menjustifikasikan penggunaan prinsip seperti itu. Elemen penting kedekatan masa jelas tiada. Keempat-empat kesalahan telah dilakukan dalam tempoh tahun 2002 hingga 2005. Walaupun kepentingan tertuduh haruslah diambil kira sewaktu menjatuhkan hukuman, kepentingan awam adalah paling utama, terutama dengan mengambil kira fakta bahawa tertuduh sedang menjawat kedudukan yang beramanah sewaktu dia melakukan kesalahan (lihat perenggan 67–68).]

Cases referred to

(1) Namasiyiam (2) Rajindran (3) Goh Chin Peng, And (4) Ng Ah Kiat v PP [1987] 2 MLJ 336, SC (refd)

Balachandran v PP [2005] 2 MLJ 301; [2005] 1 CLJ 85, FC (folld)

Jeferi bin Ipee v PP [2013] 3 MLJ 467, CA (refd)
Mat v PP [1963] 1 MLJ 263 (refd)
Pendakwa Raya lwn Sulaiman bin Saidin [2010] 3 MLJ 383; [2010] 1 CLJ 184, CA (refd)
Saad bin Abas & Anor v PP [1999] 1 MLJ 129; [1998] 4 CLJ 575, CA (refd)

Legislation referred to

Anti-Corruption Act 1997 (repealed by Malaysian Anti-Corruption Commission Act 2009)
Anti-Money Laundering, Anti-terrorism Financing and Proceeds of Unlawful Activities Act 2001 ss 3, 3(aa), (bb) 4, 4(1), (1)(a), (2), 55(1), 56, 61, Second Schedule
Courts of Judicature Act 1964 s 3
Criminal Procedure Code s 316
Evidence Act 1950 s 114(g)

Appeal from: Criminal Appeal No MT (2) 42S(A)-17 of 2012 (High Court, Johor Bahru)

Adam Yap Boon Han (CN Sritharan) (Nor Affiza & Co) for the appellant.
Anselm Charles Fernandis (Hazril Harun and Mohd Farez bin Rahman with him) (Public Prosecutor, Attorney General's Chambers) for the respondent.

Abang Iskandar JCA:

[1] Azmi bin Osman ('the accused') was charged before the sessions court in Johor Bahru on four charges of money-laundering under s 4 of the Anti-Money Laundering, Anti-terrorism Financing and Proceeds of Unlawful Activities Act 2001 ('the AMLATFA'). The prosecution led evidence to establish its case against the accused on all the four charges and at the end of the prosecution case, the learned sessions court judge ('the SCJ') found that the prosecution had failed to establish a prima facie case against the accused on all the four charges and proceeded to acquit the accused without calling for his defence.

[2] The prosecution had appealed against the said decision of the SCJ and having heard the appeal, the learned High Court judge ('the HCJ1') had allowed the appeal and had ordered the accused to answer to all the four charges before the sessions court.

[3] After hearing the evidence for the defence, the same learned SCJ had convicted the accused on all the four charges. Apart from finding the accused guilty and convicting and sentencing the accused, the SCJ had also ordered a third party notice under s 61 of the AMLATFA to be issued, in respect of the forfeiture of the property of the accused, that were seized.

[4] Aggrieved by the decision of the learned SCJ, the accused had appealed to the High Court against the conviction and sentence and the issuing of order 61 notice under AMLATFA.

[5] At the end of the appeal before the second High Court judge ('the HCJ2'), the following orders were made, namely (a) that having reviewed the ruling of the HCJ1 on whether defence ought to be called, the HCJ2 found that on the evidence, the accused ought not to have been called to enter on his defence to all the four charges because the HCJ2 had found upon review, that the prosecution evidence did not establish a prima facie case on all the four charges that were preferred against the accused. He then acquitted and discharged the accused of all the four charges. But he did not end there, *he went on to say that assuming that he was wrong with his finding of no prima facie case* having been proved by the prosecution, he had proceeded on to consider the defence and he concluded that the SCJ was correct in finding the accused guilty as the version of the accused was so improbable and that it did not create any reasonable doubt on the prosecution's case; and (b) that the issue of a notice under s 61 of the AMLATFA by the SCJ was affirmed.

[6] The public prosecutor had appealed against the order of acquittal and discharge by the learned HCJ2 in relation to all the four charges. The accused had also appealed against the HCJ2's decision on the notice issued under s 61 of the AMLATFA. Hence these two appeals before us.

[7] Upon considering the submissions put forth by the respective learned counsel appearing for both parties, we had indicated to parties that we would need some time to deliberate on the issues ventilated before us and we had informed parties that they would be duly notified of the date of decision. This is our decision.

[8] Having considered the submissions by both parties, we are unanimous in allowing the appeal of the public prosecutor and we are unanimous too, in dismissing the appeal of the accused person on the matter regarding the order on the issue of notice to third party under s 61 of the AMLATFA pertaining to the forfeiture of the properties described in exhs P100 to P112. Our reasons now ensue.

THE FOUR CHARGES

[9] Before proceeding to the issues before this court, it is worth to note that the charges proffered against the accused are as follows:

First Charge:

Bahawa kamu di antara 6 Februari 2002 dan 20 Disember 2002 di Malayan Banking Berhad di No 1, Jalan Haji Kassim, Mentakab di dalam Daerah Temerloh, di dalam Negeri Pahang Darul Makmur, telah melibatkan diri dalam penggubahan wang haram iaitu menerima wang hasil daripada aktiviti haram sebanyak RM2,085,300.00 melalui akaun semasa kamu di Malayan Banking Berhad bernombor 00602531564 dan oleh itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah subseksyen 4(1)(a) Akta Pencegahan Penggubahan Wang Haram dan Pencegahan Pembiayaan Keganasan 2001.

Second charge:

Bahawa kamu di antara 15 Januari 2003 dan 2 Oktober 2003 di Malayan Banking Berhad di No 1, Jalan Haji Kassim, Mentakab di dalam Daerah Temerloh, di dalam Negeri Pahang Darul Makmur, telah melibatkan diri dalam penggubahan wang haram iaitu menerima wang hasil daripada aktiviti haram sebanyak RM679,850.00 melalui akaun semasa kamu di Malayan Banking Berhad bernombor 00602531564 dan oleh itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah subseksyen 4(1)(a) Akta Pencegahan Penggubahan Wang Haram dan Pencegahan Pembiayaan Keganasan 2001.

Third charge:

Bahawa kamu di antara 13 Januari 2004 dan 17 November 2004 di Malayan Banking Berhad di Lot M1-22, Level 3, Johor Bahru City Square, 106-108 Jalan Wong Ah Fook, di dalam Daerah Johor Bahru, di dalam Negeri Johor Darul Takzim, telah melibatkan diri dalam penggubahan wang haram iaitu menerima wang hasil daripada aktiviti haram sebanyak RM941,930.00 melalui akaun semasa kamu di Malayan Banking Berhad bernombor 501011803326 dan oleh itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah subseksyen 4(1)(a) Akta Pencegahan Penggubahan Wang Haram dan Pencegahan Pembiayaan Keganasan 2001.

Fourth charge:

Bahawa kamu pada 5 Januari 2005 di Malayan Banking Berhad di Lot M1-22, Level 3, Johor Bahru City Square, 106-108 Jalan Wong Ah Fook, di dalam Daerah Johor Bahru, di dalam Negeri Johor Darul Takzim, telah melibatkan diri dalam penggubahan wang haram iaitu menerima wang hasil daripada aktiviti haram sebanyak RM250,000 melalui akaun semasa kamu di Malayan Banking Berhad bernombor 501011803326 dan oleh itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah subseksyen 4(1)(a) Akta Pencegahan Penggubahan Wang Haram dan Pencegahan Pembiayaan Keganasan 2001.

[10] As is apparent from the charges preferred against the accused, they were concerned with the offences allegedly committed in the period that spanned between 2002 and 2004. As such, the pertinent laws applicable must be those that were in force during that period of time.

[11] The facts of the case, in gist, can be summarily narrated as follows:

[12] The accused was a Police Superintendent in Secret Societies, Gambling, and Vice Division ('D7') of Polis Diraja Malaysia (PDRM) at IPK Johor from 1 April 1999 until 1 October 2003. He was suspended from his duty commencing on 16 November 2007 pursuant to an investigation against him. His monthly salary was paid into his CIMB Account bearing the number 06090000004095. ASP W Mustappa bin W Ahmad ('PW3') confirmed that the accused's last nett monthly pay while at IPK Johor was RM2,855.49.

[13] The complainant, Syamsul bin Osman ('PW1') an investigating officer with SPRM confirmed that the accused was initially investigated under the Anti-Corruption Act 1997 but in the course of investigation, he was suspected to have committed offences under s 4 of the AMLATFA. PW1 then lodged a report (P3) on the same.

[14] The investigation under AMLATFA was taken over by investigating officer Abd Rahman ('PW22'). Throughout his investigation, PW22 obtained various bank-related documents, together with a statutory declaration ('SD') affirmed by one Singaporean by the name of Jethalal Shah ('Shah'), and the accused himself.

[15] Shah, in his SD, made a declaration that he had from 1999 to 2004, given commissions to the accused amounting to RM6,250,000.

[16] A networth analysis report by Puan Suzaliyana Hashim ('PW24'), a forensic accounting officer, revealed that the accused had an unknown source of income of about RM9,481,414.18 based on the information given by the investigating officer. When PW22 was transferred to another branch in January 2007, the investigation was handed over to Puan Noor Irdawani bt Nawi ('PW23'). A notice for forfeiture of property belonging to the accused was issued against him by PW3.

[17] An executive officer in Suruhanjaya Syarikat Malaysia ('SSM') testified in court that based on the records kept by the SSM, neither the accused nor his wife held any directorship in any company registered with the SSM.

[18] Chong Siong Fah ('PW19') testified that he was the 'middle man' to the accused. The accused had once asked him to introduce him to a 'tauke ekor haram' for the purpose of asking monthly payment so that the accused would not interfere with his unlawful activity. However, the 'ekor haram' transaction did not involve PW19 himself.

[19] Chai Ngew ('PW20') testified that he, together with one Ah Teck (Lee Shin Teck/ PW21) used to meet the accused in a coffee house of a hotel in Johor Bahru. At that time PW20 was operating an 'ekor haram' syndicate. It was PW21 who dealt with the accused on behalf of PW20. PW21 told PW20 that the accused asked him to pay RM1,500 per month. PW20 had made payments to the accused for almost two years. However the payments were not made directly to the accused himself, but instead through PW21, and this was confirmed by PW21.

[20] The accused's version had been that the huge monies in his Maybank accounts were commissions that he had received for introducing some bank facility to a businesswoman in Indonesia by the name of Yenny Susanti.

[21] Based on the above, the accused was subsequently charged with four offences under the AMLATFA 2001 before the sessions court in Johore Bahru. He was then convicted of all the four charges and a notice under s 61 to third parties in respect to the forfeiture of the subject-matter of the offences was issued by the learned SCJ. The accused had then appealed to the High Court against that adverse decision against him.

[22] His appeal was allowed by the HCJ2. His ensuing acquittal on all the four charges by the HCJ2 and the affirmation of the third party notice by the HCJ2 had led to these two appeals by respective parties before us.

THE APPEAL OF THE PUBLIC PROSECUTOR

On the preliminary issue

[23] During the course of submissions before us, a preliminary issue was raised by the learned deputy for our decision. The preliminary issue has been whether the HCJ2 in dealing with an appeal from the sessions court against conviction, was competent to review the evidence led during the prosecution stage, in determining whether there was a prima facie case established and for defence to be called, *as had been found by the HCJ1*, when the latter had allowed the appeal by the prosecution against the order of acquittal at the end of the prosecution stage of the same case.

[24] The learned HCJ2 had ruled that he could do so. He then proceeded to hold that the earlier HCJ1 had erred when he had ruled for the defence to be called on all the four charges. Citing two decisions of the Court of Appeal that appeared to hold differently on a similar situation, the learned HCJ2 had preferred the decision of the Court of Appeal in *Jeferi bin Ipee v Public Prosecutor* [2013] 3 MLJ 467 ('*Jeferi*'s case') to that of the case of *Pendakwa Raya lwn Sulaiman bin Saidin* [2010] 3 MLJ 383; [2010] 1 CLJ 184

('*Sulaiman*'s case'). A reading of the *Jeferi*'s case would show that the second Court of Appeal had reviewed the evidence led by the prosecution on the issue of identity and after having done that it had confirmed that the first Court of Appeal was correct in holding that there was a positive identification of the accused person by the prosecution witness and as the central issue was that of identification of the accused person, the first Court of Appeal was correct in allowing the prosecution's appeal and ordered the accused person to enter his defence.

[25] We noted that the *Sulaiman*'s case was not cited in the *Jaferi*'s case, despite the fact that *Sulaiman*'s case was an earlier decision of the Court of Appeal. We noted too that there was no discussion in *Jaferi*'s case on the propriety of such an approach. But we must hasten to add and to be fair, that what ought to be the proper approach to be employed in such a situation was not an issue that was a subject of a full ventilation by parties before the second Court of Appeal in both the cases, as far as the reported judgments would show. As regards the *Sulaiman*'s case, the approach was clearly stated by learned Justice Sulaiman Daud JCA speaking for the panel when he said, at p 188 of the report, at held (5) as follows:

> The consequences of the failure by the prosecution to call the informer as a witness was considered by the trial judge at the end of the prosecution case. *The fact that this court set aside the decision of the trial judge in the earlier appeal clearly showed that this court had rejected the said grounds.* ... In this appeal, the defence attempted to show the active role played by the informer in what was said by the trial judge as a drug deal trap. Nevertheless, this court rejected the evidence of the accused that attempted to correlate the informer with the plastic parcel alleged to be given to him by the informer to be given to SP6. (Emphasis added.)

[26] In other words, inherent in the judgment of the second Court of Appeal in the *Sulaiman*'s case is that it had accepted the decision of the first Court of Appeal which had disagreed with the findings of the trial judge in acquitting the accused person at the end of the prosecution's case. There is no necessity for the second Court of Appeal to re-evaluate the evidence led in the prosecution's case that the first Court of Appeal had ruled as having established a prima case for the accused person to answer. The re-evaluation will only take place after the whole case is completed, and the purpose of such re-evaluation is solely to determine *whether the evidence led in the defence has cast a reasonable doubt in the prosecution case.* In a case where a statutory presumption is invoked, such an exercise would be to determine whether the evidence as led by the accused person has rebutted that presumption on the balance of probability.

[27] It was apparent to us from a reading of his grounds of decision that the HCJ2 had reasoned out that as his jurisdiction vis-a-vis the earlier HCJ1 was of coordinate jurisdiction, he was therefore not bound by the earlier decision of

the HCJ1 in calling for the defence to be entered and that he could therefore review the HCJ1's decision and determine for himself as to whether on the evidence as led by the prosecution had established a prima facie case and whether defence ought to be called. On that understanding, the HCJ2 had reviewed the evidence and concluded that the HCJ1 was wrong in calling for the accused to enter on his defence on all the four charges. His reason was because the evidence led by the prosecution did not establish a prima facie case on all the four charges for money-laundering offences.

[28] With respect, we are of the view that the learned HCJ2 had erred when he disturbed the findings of the earlier HCJ1 who had ordered the accused to enter on his defence to all the four charges, on appeal. The dominant issue that ought to guide the HCJ2's mind in dealing with a situation that has now become this preliminary issue must of necessity be the fact that when the HCJ1 made that decision for defence to be called, the latter was carrying out his appellate jurisdiction. Granted that the High Court jurisdiction is coordinate among its judges, inherent in that concept is the fact that a High Court judge cannot overrule another High Court judge who had made a decision at some crucial stage of proceedings in the same case. In the context of this appeal before us, the HCJ1 had ordered the accused's defence to be called to answer to the four charges leveled against him. The jurisdiction to correct that purported error, said by the HCJ2 as having been committed by the HCJ1, with respect, lies with the Court of Appeal, should there be an appeal against the decision of the HCJ2. In other words, as much as a High Court judge's decision does not bind his brother or sister judge on the High Court bench, by the same token, neither does it lie with his brother or sister judge of the High Court to overturn his decision in the same case. In a situation now prevailing in this case, the role of the HCJ2 is only *limited to see whether the defence evidence as led has succeeded in creating a reasonable doubt in the prima facie case as found by the HCJ1 on appeal by the prosecution*. With respect, this must be preferred position as to what the proper approach ought to be, as was employed by the Court of Appeal in the *Sulaiman*'s case. Coordinate jurisdiction connotes parity and as such, it does not admit nor permit mutual over-riding or over-ruling each other's decision. Only a higher appeal court can disturb or vary or affirm a High Court decision.

[29] In the context of the situation that arose in this case before us, it is therefore our view that the reason advanced by the learned HCJ2 that had purportedly provided him with the power to review the HCJ1 decision to call for the defence to be entered was, with respect, flawed and erroneous. As such, on the preliminary issue raised by the learned deputy, we find that there is merit in his contention. The learned HCJ2 was wrong in reviewing and overturning the earlier decision of the HCJ1, in the first appeal by the prosecution. His role,

in the circumstances, as stated above, is limited to determining whether the defence had raised a reasonable doubt at the end of the defence case.

The prosecution's case: Is there established a prima facie case in all the four charges?

[30] Having said that, we, sitting in the Court of Appeal have the proper jurisdiction to review the whole case and that includes relooking at the evidence that was led by the prosecution for the purpose of determining whether the learned HCJ1 was correct when he ruled that there was sufficient evidence in law for calling the accused to enter his defence on all the four charges. We had thus proceeded to review the evidence led by the prosecution, and essentially, the critical evidence are as follows:

(a) the prosecution had adduced evidence through SP19, SP20, and SP21 that the appellant had received the proceeds from the illegal activities amounting to RM30,000 or more;

(b) it has also been proven through the bank staffs, namely SP8, SP9, SP10, SP15 and SP16 that the following sums of monies had been paid into the two Maybank accounts belonging to the appellant:

(i) RM2,085,300

(ii) RM679,850

(iii) RM941,930

(iv) RM250,000;

(c) evidence has also been adduced through ASP Wan Mustafa ('SP3') on the salary of the appellant which was paid into the appellant's CIMB's account, the amount which does not commensurate with the huge amounts of cash found in his two Maybank accounts;

(d) one executive officer from SSM Johor, Encik Azrin bin Mohd Ripin ('SP4') had testified that from the records of SSM, the appellant was not involved in carrying out any form of business activities. Neither was he a director of any registered company; and

(e) SP24, a forensic officer from the forensic branch Ibu Pejabat BPR Putrajaya told the court that he had prepared a 'Laporan Forensik Perakaunan' ('exh P98') which reveals that the appellant had an unknown source of income of about RM9,481,414.18 without taking into account his alleged commission from Shah.

[31] The crux of this case really turned upon what is meant by 'money laundering' in the definition of s 3 of the AMLATFA. Once that is established, the next step is to appreciate the evidence that had been led at the trial court before the learned SCJ, to see whether the offences of money laundering as

contained in the four charges had been constituted and proven by the prosecution.

[32] To our mind, what the definition of 'money laundering' as provided for under s 3 of the AMLATFA means is this. A person commits an offence of money laundering under the AMLATFA, if he, among others, either directly or indirectly, is concerned in a transaction involving proceeds from any unlawful activity, where from an objective circumstance, he can be concluded to know or has reason to believe, that the proceeds that he is concerned with in the transaction are proceeds from an unlawful activity.

[33] It is clear to our mind that the offence as defined under s 3 of the AMLATFA is aimed at any person who knowingly engages in proceeds of an unlawful activity. The offence is concerned with the proceeds of an unlawful activity. In other words, it is a post-predicate offence activity of knowingly dealing with the unholy fruits of an unlawful activity. As such, for such an offence of money-laundering to stick on an accused person under s 4(1)(a) of the AMLATFA, it is not necessary that he must first be convicted with the predicate serious offence from which the proceeds were derived. Section 4(2) of the AMLATFA expressly provides for that. That statutory provision is couched in the following terms: 'A person may be convicted of an offence under subsection (1) irrespective of whether there is a conviction in respect of a serious offence or that a prosecution has been initiated for the commission of a serious offence or foreign serious offence'. His culpability that attracts criminality is premised upon the fact that he is knowingly concerned with the illegal proceeds from the unlawful activity. We reproduce s 4(1) of the AMLATFA which reads as follows:

> 4(1) Any person who —
>
> (a) engages in, or attempts to engage in; or
>
> (b) abets the commission of, money laundering, commits an offence and shall on conviction be liable to a fine not exceeding five million Ringgit or to imprisonment for a term not exceeding five years or to both.

[34] For ease of reference, we also reproduce s 3 of the AMLATFA where it defines money-laundering as follows:

> 'money-laundering' means the act of a person who:
>
> (a) engages, directly or indirectly, in a transaction that involves the proceeds of unlawful activity;
>
> (b) acquires, receives, possesses, disguises, transfers, converts, exchanges, carries, disposes, uses, removes from or brings into Malaysia proceeds of any unlawful activity; or

(c) conceals or disguises or impedes the establishment of the true nature, origin, location, movement, disposition, title of, rights with respect to, or ownership of, proceeds of any unlawful activity;

Where —

(aa) as may be inferred from objective factual circumstance, the person knows or has reason to believe, that the property is proceeds from any unlawful activity; or

(bb) in respect of the conduct of a natural person, the person without reasonable excuse fails to take reasonable steps to ascertain whether or not the property is proceeds from an unlawful activity;

[35] As was alluded to earlier, it is immaterial that he, or for that matter anyone, is not convicted for the predicate serious offence. It is money–laundering, for example, if he engages in any manner involving proceeds of an unlawful activity if he, without reasonable excuse, fails to take steps to ascertain whether or not the property is the proceeds of an unlawful activity. The law recognises the difficulty that the investigation may face in absolutely establishing the direct nexus between the accused and the illegal proceeds from the unlawful activity. That was the reason as to why the definition of money-laundering has been couched in the manner that appears under s 3 of the AMLATFA in which para (aa) *imputes knowledge of the proceeds being from an unlawful activity viewed from an objective factual circumstance*, and under para (bb) *in respect of a natural person, his conduct, where he had without reasonable excuse failed to take steps to ascertain that the monies are not proceeds of an unlawful activity, namely a duty is cast on him to take steps to ascertain the nature of the proceeds, in terms of their lawfulness or legitimacy.* With respect, we agree with the learned deputy on this issue on the true effect of paras (aa) and (bb) being the mens rea element in the definition of money-laundering under s 3 of the AMLATFA.

[36] Those paras (aa) and (bb) define the mens rea necessary to turn the preceding actus reus (conduct) into a money laundering offence. It does not excuse wilful blindness on the part of the accused person. There is no room for safe harbours, where proceeds of an unlawful activity may find itself quietly nestling in so-called bank accounts of 'innocent' account holders. A bank account holder must be vigilant and must take steps to ensure that monies that are received in his account are not proceeds of any unlawful activity and that he knows that the source of those monies is lawful, lest he runs afoul of AMLATFA and runs the risk of being charged for an offence of money-laundering. The doctrine of willful blindness imputes knowledge to an accused person who has his suspicion aroused to the point where he sees the need to inquire further, but he deliberately chooses not to make those inquiries.

Professor Glanville Williams has succinctly described such a situation as follows: 'He suspected the fact; he realised its probability; but he refrained from obtaining the final confirmation because he wanted in the event to be able to deny knowledge. This, and this alone is willful blindness' (*Glanville Williams, Criminal Law* (2nd Ed, 1961) at p 157). Indeed, in the context of anti-money-laundering regime, feigning blindness, deliberate ignorance or willful ignorance is no longer bliss. It is no longer a viable option. It manifests criminal intent.

[37] We had looked at the so-called circumstantial evidence that was led by the prosecution. We had listed them down in the preceding paragraphs of our judgment.

[38] Indeed the elements contained under s 3 of the AMLATFA have been fulfilled. His monthly income was banked into his CIMB account but yet the millions had found their way into his Maybank accounts in a steady stream of transactions. The dictates as contained in paras (aa) or/and (bb) to that definition of money laundering have been in play against the accused. By sheer amounts and frequency, viewing the attendant circumstances objectively, as required under the law, the accused knew or ought to have reason to believe that the amounts are illegal proceeds, or that for the same reason, he was given ample notice on account of the numerous transactions involving his Maybank accounts and yet he had wilfully turned a blind eye as to their sources or origin. The evidence of the Maybank officer, Puan Khatijah bte A Rahman ('PW7'), the operations manager at the Johor branch had testified that the accused never inquired from her regarding his accounts at Maybank despite the large amounts that were banked into his accounts. We agree with the learned deputy's submissions that an inference can be made via para (bb) to the definition of money-laundering under s 3 that such conduct on the part of the accused, without any reasonable excuse in not taking steps to ascertain whether the monies that went into his accounts at Maybank totalling about RM4m were proceeds of an unlawful activity. Being a serving police officer in charge of D7 at all material time did not help exculpate him. Instead, it must be taken against him in so far as the element of knowledge is concerned.

[39] The law as contained in the AMLATFA is meant to criminalise such unconscionable conduct or behaviour with regard to proceeds of an unlawful activity. What is unlawful activity is defined under s 3 of the AMLATFA as follows: 'any activity which is related, directly or indirectly, to any serious offence or any serious foreign offence'. That section also defines 'proceeds of unlawful activity' to mean 'any property derived or obtained, directly or indirectly by any person as a result of any unlawful activity'. What are 'serious offences' are those offences that are described in the Second Schedule of the AMLATFA of which corruption is one of them. So is illegal gambling listed in

A the Second Schedule of the AMLATFA as well.

[40] In this case, it was not disputed that the accused had been proven to have accepted bribes from persons who were involved in illegal gambling. In crude terms, the accused was on the payroll of these people, whom he had B abstained from taking enforcement action against. He had been receiving proceeds from illegal gambling activity in exchange for him giving protection for them, from enforcement action against them by the police. With that as a backdrop, there existed grounds for the accused to reasonably believe that the monies he received and banked into his Maybank accounts were proceeds from C unlawful activity. At the same time, these monies were also corrupt monies, being bribes given to him by the gambling operators (see Second Schedule).

[41] From the circumstantial evidence led by the prosecution, the scenario D had been created such that by applying the objective test either in para (aa) to s 3 of the AMLATFA the accused knew or had reason to believe that the monies that he received in his Maybank accounts were proceeds from an unlawful activity, or under para (bb) to s 3 of the same he had failed to take reasonable steps to ascertain whether or not the monies were proceeds from an unlawful E activity. In fact, para (bb) in s 3 of the AMLATFA clearly puts the burden on the accused, being a natural person, 'to take reasonable steps to ascertain whether or not the monies were proceeds from an unlawful activity'. The accused would have to show evidence of what steps he had taken to ascertain the source of the huge sums of monies that had gone into his Maybank F accounts.

[42] To our mind, the cumulative effect of the numerous circumstantial evidence as outlined by the learned deputy is sufficient to establish the prima facie case following the test enunciated by the Federal Court in the G *Balachandran v Public Prosecutor* [2005] 2 MLJ 301; [2005] 1 CLJ 85. To repeat what was said by the apex court, we reproduce here the pith and substance of what would constitute a prima facie case, in the words of the learned Justice Augustine Paul FCJ:

H > A prima facie case is therefore one that is sufficient for the accused to be called upon to answer. This in turn means that the evidence adduced must be such that it can be overthrown only by evidence in rebuttal. The phrase 'prima facie case' is defined in similar terms in *Mozley and Whiteley's Law Dictionary,* (11th Ed) as:
>
> I A litigating party is said to have a prima facie case when the evidence in his favour is sufficiently strong for his opponent to be called on to answer it. A prima facie case, then, is one which is established by sufficient evidence, and can be overthrown only by rebutting evidence adduced by the other side'.
>
> ...
>
> As the accused can be convicted on the prima facie evidence it must have reached a

standard which is capable of supporting a conviction beyond reasonable doubt. However it must be observed that it cannot, at that stage, be properly described as a case that has been proved beyond reasonable doubt. Proof beyond reasonable doubt involves two aspects. While one is the legal burden on the prosecution to prove its case beyond reasonable doubt the other is the evidential burden on the accused to raise a reasonable doubt. Both these burdens can only be fully discharged at the end of the whole case when the defence has closed its case. Therefore a case can be said to have been proved beyond reasonable doubt only at the conclusion of the trial upon a consideration of all the evidence adduced as provided by section 182A(1) of the Criminal Procedure Code. That would normally be the position where the accused has given evidence. However, where the accused remains silent there will be no necessity to re-evaluate the evidence in order to determine whether there is a reasonable doubt in the absence of any further evidence for such a consideration. The prima facie evidence which was capable of supporting a conviction beyond reasonable doubt will constitute proof beyond reasonable doubt.

[43] As to the non-calling of the wife of the accused as a witness by the prosecution, the record shows that she was offered to the defence. There was therefore no suppression of a material witness and that her non-calling by the prosecution did not leave any material gap in the prosecution case. There were other witnesses whose evidence was sufficient to prove the charges against the accused person. The law on non-calling of witnesses is rather trite now. As we understand it to be, it is driven by two main considerations. One, if there is suppression of material witnesses, then the adverse inference as contained under s 114(g) of the Evidence Act 1950 may be invoked against the party who does the suppression. Two, another aspect of non-calling is related to the effect it may have as a result of the non-calling of a material witness which invariably will result in a material gap being created in the case of the party who has failed to call the material witness. It goes to the sufficiency of the evidence that is required to be adduced in order to discharge the attendant burden which the non-calling party has to discharge.

[44] As such, not all instances of non-calling of witnesses will result in failure to prove one's case. As could be seen in the Supreme Court decision in the *(1) Namasiyiam (2) Rajindran (3) Goh Chin Peng, And (4) Ng Ah Kiat v Public Prosecutor* [1987] 2 MLJ 336, (SC) if there is already before the court, overwhelming evidence to prove the necessary facts, a mere non-calling of a witness, however material, is regarded as being not necessarily fatal. A short revisit to what learned Justice Syed Agil Barakbah SCJ had said in the *Namasiyiam*'s case will indeed be illuminating, and this is what His Lordship had said:

Clearly, Francis was a *participes criminis*, an accomplice in the true sense of the word. It was submitted that the absence of Francis at the trial would raise the presumption under section 114(g) of the Evidence Act unfavourable to the prosecution. Be that as it may, in the light of overwhelming prosecution evidence as stated earlier, we do

not think that the presence of Francis, had he been available, would have made any difference.

[45] In this case, there has been the evidence of various other witnesses who had established the needed ingredients of money-laundering as required under s 3 of the AMLATFA to link the accused to the proceeds of the unlawful activity such that there was no material gap in the prosecution case. As such, the further need to call the wife of the accused did not arise and no adverse inference ought to be invoked against the prosecution on account of it.

[46] On account of that, we are of the view that the learned HCJ1 was correct when he ruled in favour of allowing the appeal by the prosecution, as follows:

> Apabila terbuktinya yang wang-wang yang dimaksudkan itu telah diterima oleh responden melalui akaun yang dimaksudkan itu, makanya bebanan adalah tertanggung di pihak responden untuk menjelaskan tentang kedudukan serta status wang-wang tersebut, sama ada ianya adalah merupakan hasil daripada aktiviti judi ekor haram yang diperolehi oleh responden daripada ketiga-tiga saksi tersebut. Ini sebagai menepati kepada istilah 'aktiviti haram' dan 'hasil daripada aktiviti haram'; seperti yang didefinasikan di bawah Akta. (As at p 0329 Records of Appeal Vol 2).

[47] We find that such finding by the HCJ1 was in perfect consonance with para (bb) to s 3 of the AMLATFA. His conduct in relation to the monies in his Maybank accounts needed to be explained away accordingly in his defence.

[48] As such, applying the test in *Balachandran*'s case on the evidence as led by the prosecution, circumstantial they may be, we are of the view that the prosecution had satisfied the threshold burden of establishing a prima facie case against the accused in respect of all the four charges. In such a situation, as in all cases where defence has been called, if the accused elects to remain silent, he shall be convicted on the charges. The accused person therefore, in answering the charges will have to create a reasonable doubt, not just any whimsical doubt or fleeting doubt on the mind of the court, on the prosecution's case pertaining to the essential elements of the charges as preferred against him. In this case, we noted that the accused had elected to give evidence under oath.

The defence case: Has it created a reasonable doubt on the prosecution case?

[49] We had considered the defence put up by the accused and basically he was trying to explain away how the huge sums of monies had been transacted in his Maybank accounts and his version had been that they were not proceeds of any unlawful activity.

[50] It was the finding of the learned SCJ that the defence had not raised any

doubt in the prosecution case so as to entitle him to be acquitted. The learned SCJ could not comprehend how the accused person, being a serving police officer at the material times, while still on the public payroll, earning a steady monthly income of about RM4,000 only, could be receiving of gastronomical amounts into his Maybank accounts, when it was established through the evidence that he had no other legitimate callings which could have generated those colossal amount of monies. The evidence of ASP Wan Mustapha ('PW3') who testified on his fixed income was not disputed. The accused's version that those huge amounts had come from the Indonesian lady as commissions for introducing to her certain business propositions had not impressed the learned SCJ when she assessed the credibility of the evidence of the accused. She had found such evidence as being not credible and that it did not raise any reasonable doubt on the prosecution case.

[51] As was alluded to earlier, the accused person was at the material times a serving police officer of considerable enforcement power at his disposal by virtue of his senior rank in the police force. As a salaried earner, his income was fixed, just like all his peers in the civil service. It therefore had been left to the accused to justify where those monies in his Maybank accounts had emanated from.

[52] The defence of the accused had been that he received those monies as commissions for assisting an Indonesian business lady, purportedly by the name of 'Yenny Susanti' in obtaining facilities, a business deal that was introduced to him by a Singaporean male by the name of Shah. The commissions had totaled in millions of Ringgit. The learned SCJ considered this line of defence and she was not totally impressed. Still, she had considered it even though the existence of such a lady was not put nor suggested by the defence to the prosecution's relevant witnesses at the relevant stage of the proceedings during trial. In short, there was no *Alcontara* notice given to the prosecution. Indeed, it smacked of an afterthought. Be that as it may, it was only after giving it her due consideration, did the learned SCJ find the version of the accused to be too incredible to even raise a reasonable doubt, let alone to be believed. We now reproduce the findings of the learned SCJ that appears at p 11 of her grounds of judgment (as at p 0438 records of appeal) which reads as follows:

> Watak dan peranan 'Yenny Susanti' walaupun tidak pernah ditimbulkan oleh pihak pembelaan semasa kes pendakwaan tetap diberikan pertimbangan oleh mahkamah ini. Ternyata dari keterangan OKT/Perayu, Yenny Susanti memainkan peranan yang besar sehingga membolehkan OKT/Perayu memperolehi wang komisyen sebanyak RM6.25 juta, tetapi malangnya Yenny Susanti tidak dipanggil memberikan keterangan bagi menyokong pembelaan OKT/Perayu. Oleh itu saya berpendapat bahawa kewujudan Yenny Susanti sengaja direka-reka. Saya juga berpendapat bahawa pembelaan OKT/Perayu bahawa beliau menerima wang komisyen sehingga RM6.25 juta dengan hanya memperkenalkan seorang

pelanggan kepada Shah adalah pembelaan yang tidak munasabah dan tidak dapat dipercayai.

[53] As regards to Shah, a statutory declaration was obtained from him and it was tendered as a prosecution exhibit and marked as P99 during the course of the trial. Under para 2 of the P99 Shah had declared that the monies that he sent to the accused were to be kept with the accused as a custodian. The accused had testified that they were his for keep, as they were his commissions. This material contradiction remained unexplained by the accused.

[54] The learned SCJ had found that even on the lower threshold of merely casting a reasonable doubt, the accused had through his evidence as led at trial, fallen short. We agree with her findings on the defence. Essentially, the defence premised upon Yenny was an afterthought. She correctly applied the proper test as laid down in the case of *Mat v Public Prosecutor* [1963] 1 MLJ 263. At the same page at para [9.0] of her grounds of judgment, the learned SCJ had concluded as follows:

> Berdasarkan penemuan-penemuan di atas saya memutuskan bahawa pihak pendakwaan telah berjaya membuktikan kes melampaui keraguan yang munasabah bagi setiap pertuduhan ke atas OKT/ Perayu dan pihak pembelaan telah gagal menimbulkan keraguan yang munasabah dalam pembelaannya. Dengan itu, OKT/perayu didapati bersalah dan disabitkan dengan setiap pertuduhan ke atas beliau.

[55] We have considered the evidence led by the accused in his defence. Under the circumstances, we cannot find any reason why we should interfere with the findings made by the learned SCJ which ultimately led her to find the accused guilty as charged on the four charges. We find that the convictions entered against the accused on all the four charges are safe to be affirmed.

[56] Premised upon the above, the order of acquittal and discharge entered in favour of the accused person on all four charges by the HCJ2 at the end of the prosecution case is hereby set aside, as we allow the appeal by the public prosecutor. The conviction entered against the accused is by the SCJ is therefore reinstated.

[57] We are in agreement with the learned SCJ that the evidence led by the prosecution had established beyond reasonable doubt that the accused's impugned conduct in relation to the monies that he received in his Maybank accounts, fits into the profile of a money-launderer as defined under s 3 of the AMLATFA 2001 as charged.

The accused's appeal on notice to third party under s 61 AMLATFA

[58] The appeal by the accused against the issuance of the order to third party under s 61 of the AMLATFA in relation to the seized properties, relates to what is meant by 'subject-matter of the offence'. In this case, the accused had been convicted and the provisions under s 55(1) of the AMLATFA are in play. That subsection reads:

> (1) *Subject to section 61*, in any prosecution for an offence under subsection 4(1), the Court shall make an order for the forfeiture of any property which is proved to be the subject matter of the offence or to have been used in the commission of the offence where
>
> (a) the offence is proved against the accused; or
>
> (b) the offence is not proved against the accused but the Court is satisfied:
>
> (i) that the accused is not the true and lawful owner of such property; and
>
> (ii) that no other person is entitled to the property as a purchaser in good faith for valuable consideration.
>
> (2) ...
>
> (3) In determining whether the property is the subject matter of an offence or has been used in the commission of an offence under subsection 4(1) the Court shall apply the standard of proof required in civil proceedings.

[59] The provision on notice to third parties is contained in s 61 which provides:

> The Court making the order of forfeiture under section 55 or the Judge to whom an application is made under subsection 56(1) shall cause to be published a notice in the Gazette calling upon any third party who claims to have any interest in the property to attend before the Court on the date specified in the notice to show cause as to why the property shall not be forfeited.

[60] In the scheme of things under the AMLATFA, an order of acquittal and discharge does not ipso facto equate non-forfeiture. An order of forfeiture has, so to speak, a life of its own, quite independent of the order of acquittal of the accused person. It all depends on the peculiar circumstances of the case in relation to the seized properties.

[61] We would agree with the learned HCJ2 that it should be interpreted to include the monies that were seized as suspected to be involved in the money laundering investigation and which, in this case had been tendered in the sessions court as exhs P100 to P112. We are aware of the existence of s 56 of the

AMLATFA which provides for forfeiture of seized properties by way of an application by the public prosecutor to the High Court within 12 months from the date of seizure where there is no prosecution intended in respect thereto. As is clear from its wordings under that section, it applies only where the prosecution does not intend to prosecute any person in relation to the seizure. But in this case, there was a prosecution in relation to the offence in connection with the seizure of the property and the fact that P100 to P112 (containing the description of the seized properties) were tendered as part of the prosecution's case is ample proof that they were meant to be part of the prosecution's case. As such, these exhibits are part of the subject-matter of the offence, a term which to our mind connotes a wider import than a subject-matter of the charge, a term which is of a narrower import.

[62] We agree with the learned SCJ that the prosecution had proven on the balance of probability that the properties in question are proceeds of an unlawful activity which constitutes the subject matter of the offence. As the SCJ was the court making the order of forfeiture under s 55 at the end of a prosecution that had resulted in a conviction of the accused, it was incumbent upon the SCJ to issue the third party notice under s 61 of the AMLATFA before any final order on forfeiture can be made in respect the said properties. We are in agreement with the learned SCJ that the evidence led in this case would necessitate the giving of the notice to third parties by way of publication in the *gazette* who may then stake their claims by proving themselves to be bona fide owners of the seized monies, in which case the monies shall be returned to them. But if they fail to prove that they are entitled to the seized properties, then the monies shall be ordered to be forfeited to government revenue.

[63] In the circumstances, we agree with the learned deputy that the appeal of the accused in respect of the issuance of the notice under s 61 of the AMLATFA was premature. That act of issuing the said notice is only a procedural step in ensuring that genuine no third parties' rights are improperly denied. In itself, the third party notice does not determine with finality the fate of the property that was seized in connection with the commission of the offence. As such, the issue pertaining to the third party notice is not appealable within the meaning of s 3 of the Courts of Judicature Act 1964. The case of *Saad bin Abas & Anor v Public Prosecutor* [1999] 1 MLJ 129; [1998] 4 CLJ 575 is instructive on this issue where the test to be employed on whether the impugned order is appealable is to see if it has finally disposed of the rights of the parties. In the *Saad bin Abas*'s case, the order of the magistrate to call for the accused person to enter on his defence is held to be not appealable. In this case before us, the third party notice under s 61 of the AMLATFA does not dispose of the rights of the parties on the property. It is only a step in that direction and cannot by any stretch of imagination be taken as a final order that is appealable. We agree with learned deputy that a forfeiture order is subject to giving prior

notice to third parties as is clearly borne out in the wordings to s 55(1) of the AMLATFA itself. Indeed in this case, no forfeiture order had been made by the learned SCJ and there is basis for her to issue the statutory notice in order to facilitate the process pertaining to the eventual forfeiture of the seized properties which are the subject-matter of the offence before her. We therefore see no merit in the complaint of the accused person in regard to the issue of the notice under s 61 of the AMLATFA. On account of the above, the appeal by the accused person against the order on the s 61 notice under AMLATFA is dismissed.

[64] Before we depart, it had not escaped our notice that after finding that defence ought not to be called, the HCJ2 had gone on further to deal with the defence evidence, in the event that he was wrong in acquitting the accused person on the basis that there was no prima facie case. We reproduce what the HCJ2 had said, and that can be found at p 0036 of the records of appeal Vol 1, thus:

> *5. The Defence*
>
> I shall now proceed to consider the defence put forward by the appellant *on the assumption* that a prima facie case has been established by the Respondent (Prosecution). (Emphasis added.)

[65] And having considered the evidence of the defence, he had agreed with the SCJ that the accused had not raised a reasonable doubt on the prosecution case. To our mind, perhaps, the learned HCJ2 was acting in abundance of caution. But with respect, there is no room for uncertainty of finding in a criminal matter, whether in a trial or on appeal. The criminal court, at the end of the prosecution's case is expected to make a firm finding, either one of whether a prima facie case has been made out or otherwise. At the end of that exercise, the judge is mandated by law either to call for defence to be entered, or to acquit the accused person. Having made a finding on either one, that is the end of his duty on that matter. It is not open to him to delve into his doubt by offering his alternative view in the event that he is wrong with regard to his prior finding. We would consider his 'assumption' as an error of law in contravention of s 316 of the Criminal Procedure Code which in our view is another misdirection committed by the HCJ2.

[66] To recap, we hereby allow the appeal of the public prosecutor in Rayuan Jenayah J-09–28–01 Tahun 2014 and the order of acquittal by the HCJ2 is hereby set aside. The orders of conviction by the SCJ on all the four charges are reinstated and affirmed. We will deal with sentences after hearing submissions by both parties. We also dismiss the appeal of the accused person in Rayuan Jenayah J-09–27–01 Tahun 2014 on the matter regarding the order on the issue of notice under s 61 of the AMLATFA to third party pertaining to the

seized properties (exhs P100 to P112) as it is premature at this stage to entertain such an appeal as that notice is not a final order, and therefore not appealable.

SENTENCES

[67] After hearing submissions by both parties on sentencing, we are of the view that the learned SCJ had erred when she applied the 'same transaction' principle in passing sentence for the four charges. The facts relating to the four charges clearly do not justify such invocation of the said principle by the learned SCJ. The essential element of proximity of time was clearly absent. The four offences were committed during a period covering 2002 to 2005.

[68] Though the interest of the accused person must be taken into account when passing sentence, the interest of the public is however paramount, especially bearing in mind the fact that the accused was occupying a position of trust when he committed those offences. He was a deputy superintendent of police in charge of combatting vice activities, such as illegal gambling and prostitution. Instead he abused his position and obtained illegal gains.

[69] In passing sentence, this court has a duty to reflect public abhorrence against the acts committed by the accused person. A sentence of a deterrent nature needs to be meted out, to drive home the point that crime does not pay.

[70] In the circumstances, we impose a sentence of two years imprisonment for each offence, and then four sentences shall run consecutively. To our mind, this sentence reflects the magnitude of the charges and the seriousness of the offences committed by the accused person. The orders of the learned SCJ on sentences are therefore, set aside.

[71] However, we affirm the orders of the learned SCJ on the four fines that were imposed against the accused person. Also we affirm the default sentences of six months imprisonment each, in the event the accused fails to pay the respective individual fines. We so order accordingly.

Appeal by the prosecution allowed; appeal by accused dismissed.

Reported by Afiq Mohamad